

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1504

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Appellee,

v.

ANTHONY JAMES SEBASTIAN and
PATRICK GIBBONS,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

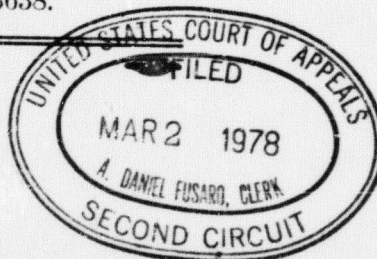
JOINT APPENDIX

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Superseding Indictment filed - 6/24/76 - see new docket sheet

Attached CRIMINAL DOCKET

UNITED STATES DISTRICT COURT

D. C. Form No. 100 Rev.

TITLE OF CASE

THE UNITED STATES

ATTORNEYS

For U. S.: R

1.5.

ANTHONY JAMES SEBASTIAN a/k/a TONY SEBASTIAN;
PATRICK GIBBONS

Conspiracy to commit offenses against the U.S. by uttering and passing with intent to defraud forged obligations of the U.S. (Ct. 1) in violation of Section 371, Title 18, U.S.C.; Did knowingly and with intent to defraud pass and utter forged obligations of the U.S. (Cts. 2 & 3) in violation of Sections 472 and 2, Title 18, U.S.C.

For Defendant: (assigned)
 (1) Stanley Collesano, Esq.
 (2) George Doyle, Esq.
 (1) Philip Abramowitz, Esq.
 (assigned) replacing Stanley Collesano)

Offenses: 5/4/72-5/26/73 3 Cts.

STATISTICAL RECORD		COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk						
J.S. 3 mailed	Marshal						
Violation	Docket fee						
Title 18							
Sec. 371, 472, 2							

DATE	PROCEEDINGS
June 21	Filed Indictment
June 21	J.S. 2 made
July 5	Filed Magistrate's transcript for Patrick Gibbons
June 29	Filed \$2,000 recognizance bond for Patrick Gibbons
July 5	Filed Magistrate's transcript for Deft. Sebastian, with \$2,000 recog. bond
June 28	Defts. being duly arraigned, both enter pleas of not guilty to the Indictment. Both Defts. released on \$2,000 recog. bond. Adj. to July 26, 1973 for motions.
July 25	Filed Deft's - Patrick Gibbons, notice of motion for disclosure, discovery & inspection, production, hearing, Brady material, bill of particulars, and etc., ret. 7/26/1973
July 25	Filed Deft. Anthony James Sebastian's notice of motion for disclosure, discovery & inspection, production, hearing, Brady material, severance, Bill of particulars.
July 26	Return date for motions. Adj. 8/2/1973
Aug. 1	Filed the Govt's response to the motion of Deft. Patrick Gibbons
Aug. 1	Filed the Govt's response to motion of deft. Anthony James Sebastian
Aug. 2	Return date for motions. Govt. advises Court they have responded to deft's motions. Adj. to 9/13/1973 for status report.

District Court Docket Sheets—Original Indictment.

DATE	PROCEEDINGS
1973	
May 29	Filed Cy. 5 - CJA-20- Order appt. Stanley Collesano counsel for Deft. Anthony Sebastian - Maxwell, J.
Sept. 13	Status Report. Adj. to 9/20/1973
Sept. 20	Status Report. Defts. seek more information from the Govt. Adj. to 10/4/1973
Oct. 4	Status Report. No appearances for defts. Govt. advises Court it has responded to defts. motions. Adj. 10/18/1973.
Oct. 4	Filed the Govt's suppl. response - Patrick Gibbons
Oct. 4	" " " " " - Anthony James Sebastian
Oct. 18	Status Report. Adj. to 11/1/1973 for meeting with court.
Nov. 20	Status report. Court sets hearing for 12/19/1973 -
Nov. 29	Filed Govt's motion to move action for trial Anthony Sebastian
Dec. 19	Hearing to suppress. Defts. move to grant their motion to suppress -- Motion granted. Court directs that any appeal must be made within 30 days-from today.
Dec. 21	Filed Order suppressing evidence--CURTIN, J.
1974	
Jan. 2	Filed Court Sten's Transcript of proceeding of Hearing on motion to suppress, before Judge Henderson, on 12/19/1973
Jan. 3	Filed Cy. 2 of CJA-21- Authorization and Voucher for transcript in the amt. of \$24.80; Orig. to the Adm. office for payment.
MAXXZ5X13	XXIXMX
Jan. 14	Filed Govt's notice of appeal from the Suppression Order suppressing all the physical evidence seized from deft. Patrick Gibbons, et al and suppressing statements of deft. Anthony Sebastian, taken on May 24, 1973, etc., which suppression order was entered in this action on the 21st Day of December, 1973; Cy. to Mr. Collesano, Mr. Doyle, and the CCA with statement of docket entries.
Jan. 14	Filed the Govt's Certificate on Appeal
Jan. 30	Orig. pertinent papers, Govt's exhibits, Clerk's certificate, docket entries, mailed to the Clerk, CCA
Mar. 4	Status Report. Adj. generally - appeal pending.
July 1	Status Report. Govt. advises court there is motion pending before the 2nd Cir., Ct. Appeals. Removed from calander. No appearance for Deft, Sebastian.
Sept. 3	Status report. No appearance for deft. Adj. to 10/22/74
Sept. 9	Filed certified cy. of mandate from CCA that the order of said District Court be and it is hereby reversed in accordance with the opinion of the CCA
Oct. 21	Status report. Adj. to 12/9/74
Dec. 9	Status Report. Govt. informs the Court they are ready for trial - Court directs the Clerk of Court to forthwith take steps to have the file returned from the Court of Appeals.
1975	
Jan.	Status report. Suppression hearing must be completed. When this is complete, case is ready for trial. Court to set date for continuance of hearing.
Feb. 14	Filed subpoena to testify - Gary C. Behm, served 2/6/75
Mar. 31	To fix date for hearing. Hearing is set for 4/22/75 - 10:00 a.m.
May 19	Hearing. Adj. to 6/18 at 10:00 a.m.
June 18	Hearing resumed from 12/19/74 with the same appearances. Court orders transcript of the hearing. Court directs that clerk change CJA forms to reflect that Philip Abramowitz is now Atty. for deft. Sebastian, replacing Atty. Stanley J. Collesano.
July 7	Filed Cy 5 of CJA-21 - authorization for Transcript
July 7	Filed Cy. 5 of CJA-20- Order appointing Philip Abramowitz, Esq., as counsel for Deft. Sebastian, replacing Stanley Collesano--CURTIN Cy. to the Adm. office, Orig. ret. to counsel for submission of voucher.

District Court Docket Sheets—Original Indictment.

Anthony James Sebastian & Patrick Gibbons
CRIMINAL DOCKET

Sheet # 2
Cr-73-237

DATE 1975	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
July 16	Filed CJA 21 Form for voucher for Ct. Steno in the amount of \$72.50		
July 16	Filed Ct. Steno's transcript of proceedings of hearing on motion to suppress, before Judge Curtin.		
Oct. 6	Filed letter dated October 3, 1975 to the Court from Atty., Philip B. Abramowitz, that he does not wish to submit anything further on this case, etc., the Court may decide this case on the materials it has presently before it		
Oct. 20	Status Report. Adj. to 10/28/75 for Government brief.		
Oct. 28	Filed Govt's Findings Of Fact And Conclusions Of Law		
Oct. 28	Return date for Governments brief. Will be filed today and then considered submitted.		
Oct. 4	Filed letter dated 9/12, 1975 from Atty. Abramowitz, to the Court, requesting that the proceedings of 9/17/75 be cancelled. He is satisfied to have the Court make a ruling as to the admissibility of Mr. Sebastian's confession on the present state of the record.		
Oct. 4	Filed Decision & Order - denying motion to suppress evidence taken from beneath a vehicle, at the time of the arrest; Deft. Sebastian's motion to suppress the statement given by him to the Secret Service Agent on 5/24/73 - denied.-- CURTIN, J.		
Dec. 15	Set date for trial no appearances for defts. Case placed on trial calendar.		
Dec. 22 1976	Status report. Case ready for trial. Adj. to 12-23-75 for meeting		
Jan 9	Pre trial held. Adj. to the ready calendar.		
Apr. 1	Filed subpoena - Anthony Conte, served 3/30/76		
Apr. 5	Filed subpoena - Delores Dumbrosky, ret. no service.		
April 9	Filed subpoena - Kathy Jean Goulder ret. no service.		
Apr. 20	Meeting with counsel. Adj. to 4-26-76		
May 4	Govt. moves case to trial before Judge Curtin at Buffalo, N.Y., whereupon the jury is duly empanelled; trial is adj. to a date to be fixed by the court.		
May 7	Trial continues from 5/4/76 with the same appearances & jury. On motion of the Government, the indictment is dismissed against both--defts.		
May 14	Filed two subpoenas - Kathy Jean Goulder- underserved; Robert A. Goulder, ret. unserved.		
May 16	Filed subpoena Robert A. Goulder, served 5/6/76		
June 2	Filed order dismissing the indictment against both defts. CURTIN, J.		
June 24	Superseding Indictment filed - see docket attached - Case is re-opened.		

District Court Docket Sheets—Superseding Indictment.

OFFENSE NO	JUDGE/MAGISTRATE Assigned	U.S.	37	SEBASTIAN, Anthony James	Case Filed Mo. Day	6 24	73	73-237	1
DEFENDANT NAME	209 1	U.S. District Court			Yr				
FEELDY NO	X	Office	(LAST, FIRST, MIDDLE)		2				
U.S. TITLE/SECTION		OFFENSES CHARGED			ORIGINAL COURTS		U.S. MAIL CASE NO.		
18-495 & 2		Aid, abet & induce a person to forge the endorsement on U.S. Savings bond (Cts. 1 through 36)			36		BVL - RELEASE		
18-371		Conspiracy to forge the endorsement on U.S. Savings Bond (Ct. 37)			1		☐ Denied ☐ AMT ☐ Fugitive ☐ Set ☐ Pers. Recog. ☐ PSA ☐ Date ☐ 10% Deposit ☐ Surety Bond ☐ Collateral ☐ Status Granted (See Locality) ☐ 3rd ☐ Other		
II. KEY DATES & INTERVALS ARREST of ☒ U.S. Custody Begins ☐ High Risk Date ☐ Information ☒ 6/2/73** ☐ 6/28/73 ☐ Trial Set For ☐ Your Day ☐ 10/25/77 Summons Served ☐ Indictment ☒ 6/24/76 ☐ Final Plea ☐ 10/25/77 ☐ Disposition of Charge ☒ Dismissed ☐ Other Charges ☐ Other Pre-Arraignment ☐ Charging Document ☒ X ☐ 6/24/76 ☐ 10/25/77 ☐ Dismissed ☐ Other ** Indictment reported dismissed & case closed on in 5/76									
SEARCH WARRANT ☐ Issued ☐ Return ☐ Issued ☐ Served Arrest Warrant Issued ☐ COMPLAINT ☐ OFFENSE in Complaint									
MAGISTRATE INITIAL APPEARANCE DATE ☐ PRELIMINARY EXAMINATION ☐ OR ☐ REMOVAL HEARING ☐ WAIVED ☐ NOT WAIVED ☐ INTERVENING INDICTMENT ☐ TYPE NUMBER									
ATTORNEYS Roger Williams, AUSA U.S. Courthouse, Buffalo, N.Y. 14202 432-3479 Robert Macek, Esq. Clinton House, 556 Franklin Street Buffalo, N.Y. 14202 (716) 833-5000									

Roger Williams, AUSA
U.S. Courthouse, Buffalo, N.Y.
14202 432-3479

Robert Macek, Esq.
Clinton House, 556 Franklin Street
Buffalo, N.Y. 14202
(716) 833-5000

(2) GIBBONS

DATE	DOCUMENT NO.	PROCEEDINGS	EXHIBITABLE COPY
6/24/76		Filed Superseding Indictment	
6/29/76		P.B.M. - Deft. being duly arraigned enters a plea of not guilty. Court directed that deft's discovery motions be filed by 7/6/76 with argument on 7/13/76. Deft. released on \$2,500 unsecured bond. Mr. Abramowitz advised the Court that he wished to withdraw as counsel for deft. Sebastian and after deft. had completed a financial affidavit, Atty. Robert Macek was assigned.	
7/7/76		Filed \$2,500 unsecured bond	
7/7/76		Filed Cy. 5 of CJA-20 - Order appointing Robert Macek, as counsel, Maxwell, Mag.	

(over)

District Court Docket Sheets—Superseding Indictment.

DATE	EVENT	FILED	CLERK	DEPT.	REMARKS
7/13/76	P.B.M. - Proceedings before the Magistrate Motions have been filed. Govt. will respond as scheduled.				
7/15/76	Filed Govt's response to certain pre- trial motions.				
7/15/76	Filed Govt's motion to move action for trial				
7/23/76	Proceedings before the Magistrate - Adj. argument to 7/27/76 - Charge time to Govt.				
7/26/76	Filed Deft's notice of motion for disclosure etc., ret. Magistrate - 7/20/76				
7/27/76	Proceedings before the Magistrate - Oral argument on motion for inspection of grand jury minutes of superseding indictment. Motion denied - discovery is complete.				
8/4/76	Pre-trial scheduled but not held. Defense counsel Robert Macek on vacation. Adj. 8/11/76				
8/11/76	Meeting scheduled but not held. No appear- ance for defts. Adj. to 8/18/76				
8/23/76	Filed Ct. Steno's transcript of proceedings taken on 5-4-76 before Judge Curtin and jury.				
8/23/76	Filed copies 2 & 5 CJA 21 authorization and voucher in the amt. of \$18.00 for Ct. Steno, copies 1 & 4 mailed to Adm. office. CURTIN, J.				
8/13/76	Meeting held with Robert Macek & Roger Williams, George Doyle absent. Defts to file motions by 9-13-76 Govt. to respond by 9-27-76.				
9/13/76	Return date for motions. No motions filed by defts. Adj. to 9/20/76				
9/20/76	Filed Deft's notice of motion for order dismissing the indictment, etc., ret. 9/4/76				
9/20/76	Return date for deft's motions. No appearance for deft. Motions are to be filed today				
9/27/76	Return date for briefs. No appearance for deft. Gibbons. At request of deft. adj. to 10/4/76.				
10/4/76	Filed Govt's memorandum in opposition to deft's motion to dismiss the superseding Indictment on the grounds of double jeopardy				

District Court Docket Sheets—Superseding Indictment.

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

U.S. v. Anthony James Sebastian

Sheet # 2

73

237

Yr.

Docket No.

Ct.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELA		
		(a)	(b)	(c)
10/4/76	Return date for briefs. Govt. brief to be filed today. Adj. to 10/26/76 for deft's memo			
10/26/76	Filed Defendant's memorandum submitted in answer to the Government's memorandum of 10/4/76 and in support of the defendants' Sebastian and Gibbon's motion to dismiss the instant indictment			
10/26/76	Memo due. Will be filed today - Atty. Macek			
12/6/76	Filed Govt's reply memorandum			
12/6/76	Return date for Govt. brief. To be filed today. Expiration 30 days	3	12/6/76	
3/14/77	Filed Decision and Order - that the court believed it proper to dismiss the original indictment. Double jeopardy does not bar the prosecution under the reindictment; This court does not believe the defendants' Sixth amendment rights have been violated, etc.--Curtin, J.		1/4/77	G
3/18/77	Pre-trial conference held. Adj. to 4/4/77 for Status Report.			
3/23/77	Filed Defts' notice of appeal from the District Court's Decision and Order, entered 3/14/77, denying defendants' motion to dismiss the Indictment herein on the grounds of (1) former jeopardy and (2) failure to afford defendants a speedy trial.		3/23/77	D
3/24/77	Cy. of Notice of appeal mailed to the U.S. Atty., and CCA with statement of docket entries.	3	10/21/77	
4/4/77	Status report. Deft has filed a notice of appeal on the double jeopardy question. Removed from calendar at this time.			
4/27/77	Defts. present in court with counsel. Court refuses to accept their offer of a plea. Defts. are directed to press their appeal now pending in the Court of Appeals.			
5/9/77	Filed Order fr Ct. of Appeals that the motion made by counsel for the appellee dated 4/12/77 to dismiss for lack of jurisdiction that part of the appeal from the U.S. Dist. Ct. for the WDNY denying defendant's motion to dismiss indict. on the ground that they were denied a speedy trial be and it is granted. FUSARO, A. Daniel, Clerk			

AO-257

Interval (per Section II) | Start Date | End Date | Ltr. To: | Code Day

District Court Docket Sheets—Superseding Indictment.

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
6/10/77	(Document No.) original pertinent papers, clerk's certificate, copy of docket entries mailed to CCA.				
10/14/77	To set trial date. Govt. is ready for trial. Trial set for October 25.				
10/21/77	Filed cert. cy. of mandate fr CCA - ordered that the order of said District Ct. be and it hereby is affirmed in accordance with the opinion of this court. FUSARO, Clerk.				
10/25/77	Deft enters a plea of guilty to count 1 and 2 of the indictment. Sentence is deferred to Dec. 6.				
12/6/77	Filed deft's Notice of Appeal.				
12/6/77	Filed \$2500 unsecured bond.				
12/6/77	Deft. is sentenced as follows: Deft is remanded to custody of the A/G for 18 months. Sentence imposed on Cts. 1 and 2 and to run concurrently. Appearances: Robert Macek, Esq. for deft. AUSA Wagner for govt.				
12/14/77	All original papers returned from CCA.				
12/14/77	Filed Judgment & Comm Order. CURTIN, J. Issued.				
12/16/77	Notice of Appeal, cy. of docket entries mailed to CCA.				
	CLOSED				

Complaint and Warrant of Arrest—May 24, 1973—Sebastian.

United States District Court
FOR THE

Western District of New York

UNITED STATES OF AMERICA

Patrick GIBBONS
and
Anthony 'Tony' SEBASTIAN

Magistrate's Docket No. 73

Case No. 73

COMPLAINT for VIOLATION of

U.S.C. Title 18

Section 814 (a)(1)

BEFORE *James J. Farrell*

James J. Farrell
Name of Magistrate

James J. Farrell
Address of Magistrate

The undersigned complainant being duly sworn states:

That on or about May 26, 1972, at Buffalo, New York

in the

Western District of New York

(1) Patrick GIBBONS and Anthony 'Tony' SEBASTIAN

did knowingly forge and utter the written endorsements on U. S. Savings Bonds all made payable to E. S. Bernice Coulter for the purpose of receiving the proceeds of the bonds with the intent to defraud the United States and knowing the same to be forged and stolen in violation of Title 18, U.S.C., Section 814 (a)(1).

And the complainant states that this complaint is based on investigation conducted by the U. S. Secret Service including sworn statements from the forger and negotiator of these bonds in listing her own participation and identifying defendants as her co-conspirators. Investigation also determined that Patrick GIBBONS was arrested in Ohio on 12/3/72 and in her possession were stock certificates and credit cards stolen from the Coulter residence in a house burglary in Ohio on 3/14/72 at which time the subject U. S. Savings Bonds were stolen.

The forger also states that the bonds were given to her by Richard Ames who had received them from Tony Sebastian in front of her. She also states that Tony Sebastian, Patrick Gibbons, and Richard Ames divided the proceeds in front of her on the day of the negotiation of the bonds.

And the complainant further states that he believes that

are material witnesses in relation to this charge.

Sworn to before me, and subscribed to my presence.

James J. Farrell
Name of Magistrate

James J. Farrell
Address of Magistrate

(1) Name of complainant.
(2) Name of defendant.
(3) Name of the person who made the complaint.

Complaint and Warrant of Arrest—May 24, 1973—Sebastian.

Form No. 10 (Rev. 12/62)

Magistrate's
Warrant of Arrest

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

Magistrate's Docket No. 73Case No. 160

UNITED STATES OF AMERICA

v

Anthony 'Tony' Sebastian

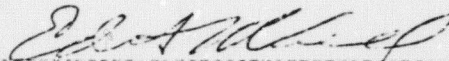
WARRANT OF ARREST

To U. S. Marshal or any other Federal Agent

You are hereby commanded to arrest Anthony 'Tony' Sebastian, and bring him
here insert name of defendant or description
 forthwith before the nearest available United States Magistrate to answer to a complaint charging him
 with conspiracy to forge and utter written endorsements on U. S. Savings Bonds knowing
 the same to be stolen. here describe offense charged in complaint

in violation of U.S.C. Title, 18, Section 371 (495)

Date

BUFFALO NY
May 24, 1973.

United States Magistrate.

¹ Here insert designation of officer to whom warrant is issued.

RETURN

Received 564, 1973 at Buffalo

, and executed by arrest of

Anthony Sebastian

at

Buffalo, NYon May 24

, 1973.

Date

, 19

By

District of

Name.

Title.

Deputy

Original Indictment—June 21, 1973.

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

ANTHONY JAMES SEBASTIAN a/k/a
TONY SEBASTIAN and PATRICK GIBBONSMARCH 1973 Session ~~XXXXXX~~

No. 1373 237

Vio. T. 18, U.S.C.,
Sections 371, 472
and 2COUNT I

The Grand Jury Charges:

That on or about the 4th day of May, 1972, and continuing to on or about the 26th day of May, 1972, in the Western District of New York and elsewhere, the defendants ANTHONY JAMES SEBASTIAN a/k/a TONY SEBASTIAN and PATRICK GIBBONS wilfully, knowingly and unlawfully combined, conspired and agreed together and with other persons, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Sections 472 and 2 by uttering and passing with intent to defraud forged obligations of the United States, to wit, thirty-six (36) United States Savings Bonds, Series E; in violation of Title 18, United States Code, Section 371.

OVERT ACTS

At the following times hereinafter mentioned,

Original Indictment—June 21, 1973.

furtherance of said conspiracy and to effectuate the objects thereof:

1. On or about the 25th day of May, 1972, the defendant ANTHONY JAMES SEBASTIAN a/k/a TONY SEBASTIAN gave Richard Ames thirty-six (36) United States Savings Bonds, Series E.

2. On or about the 25th day of May, 1972, the defendant ANTHONY JAMES SEBASTIAN a/k/a TONY SEBASTIAN gave said Richard Ames identification sufficient to enable said Richard Ames to negotiate said thirty-six (36) United States Savings Bonds.

3. On or about the 26th day of May, 1972, the defendants ANTHONY JAMES SEBASTIAN a/k/a TONY SEBASTIAN and PATRICK GIBBONS did meet at the Casablanca Restaurant in Buffalo, New York, for the purpose of receiving a portion of the proceeds resulting from the cashing of said United States Savings Bonds.

COUNT II**The Grand Jury Further Charges:**

That on or about the 26th day of May, 1972, in the Western District of New York, the defendants ANTHONY JAMES SEBASTIAN a/k/a TONY SEBASTIAN and PATRICK GIBBONS did knowingly and with intent to defraud pass and utter

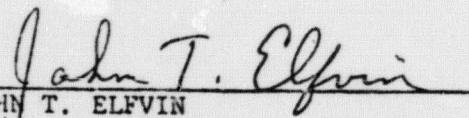
Original Indictment—June 21, 1973.

a forged obligation of the United States; to wit, United States Savings Bond, Series E, Serial Number Q2165871669E, face amount \$25.00, issue date May 1966; all in violation of Title 18, United States Code, Sections 472 and 2.

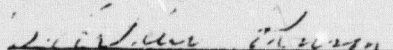
COUNT LII

The Grand Jury Further Charges:

That on or about the 26th day of May, 1972, in the Western District of New York, the defendants ANTHONY JAMES SEBASTIAN a/k/a TONY SEBASTIAN and PATRICK GIBBONS did knowingly and with intent to defraud pass and utter a forged obligation of the United States; to wit, United States Savings Bond, Series E, Serial Number Q1997736689E, face amount \$25.00, issue date August 1963; all in violation of Title 18, United States Code, Sections 472 and 2.


JOHN T. ELFVIN
United States Attorney

A TRUE BILL:


Foreman

Notice of Readiness—November 29, 1973.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

vs

CR. NO. 1973-237

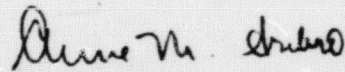
ANTHONY SEBASTIAN

Defendant

The United States of America, plaintiff herein, being ready to proceed to trial in the above entitled action, hereby moves said action for trial and asks this Court to set it down for trial at the first convenient date of this Court's calendar following completion of any and all motions.

JOHN T. ELFVIN
United States Attorney

By:


ANNE M. SREBRO
Assistant U. S. Attorney

Pages of Transcript of Suppression Hearing—
December 19, 1973.

1, 2, 3 and 4.

THE COURT: I will withhold ruling on that until we
have had the cross examination.

MRS. SKEENO: I have no further questions.

THE COURT: All right.

CROSS EXAMINATION BY MR. DOYLE:

Q I am just wondering, your Honor, - I will see how far we can
go. Mr. Behm, when was it that you were first notified that
you were to be here in court today?

A I believe that was a week ago Monday, sir.

Q All right. You were told you were going to have to be here
in connection with a suppression hearing?

A Yes, sir.

Q And involving the defendant Gibbons, is that right?

A Yes, sir.

Q Incidentally, you are a trained police officer?

A Yes, sir.

Q You realize that suppression hearings are an important part
of any criminal case?

A Yes, sir.

Q And you prepared yourself, sir, to testify here today?

A Just some dates is all.

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Q Pardon me?

A I just got some dates and times to make sure I remembered.
It has been a year since I arrested them.

Q And you checked some documents in order to get those dates
and times?

A The original complaint sheet.

Q Do you have that with you, sir?

A No, sir, I don't.

Q Did you leave that in Ohio?

A No, sir. I left it in my car over at the Statler Garage.

THE COURT: Let me ask you this. Do you have the
documents from Ohio in the court documents,
Mrs. Srebros?

MRS. SREBRO: No, your Honor. The only thing I have
from Ohio are those documents here which are
all marked.

THE COURT: Of course, you realize under the sort of
general rule that I intend to enforce in these
cases, and that is at the time of hearing that
I want any thirty-five hundred material. This
kind of thing really doesn't come under thirty-
five hundred material because it is a public
record, but it seems to me that that should

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be available for examination. I suppose, on the other hand there may be some requirement for defense counsel to busy themselves about getting things like this but since Mr. Behm has it, - we will take a break in a minute, Mr. Behm, can you bring those over, - the copies.

THE WITNESS: Your Honor, the Secret Service Agent has a copy of my complaint sheet.

THE COURT: Oh, he does.

MR. DOYLE: That is all I am asking, your Honor, in light of the fact it is - - -

THE COURT: Let us find out - - -

MR. DOYLE: Yes.

THE COURT: If there are any other papers floating around.

BY MR. DOYLE:

Q Fine. In any event, Deputy Behm, being a trained police officer and realizing that you were going to testify as an important part of this proceeding, you say you reviewed this particular complaint form, is that right.

A Yes.

Q Were there any other documents whatsoever that you reviewed in order to prepare yourself to properly testify here today?

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A No, sir. I just brought them along. I didn't use them for anything.

Q You say you brought them along; brought what along?

A My file on Mr. Gibbons.

Q You do have a file on Mr. Gibbons?

A Yes, sir.

Q Did you make some handwritten notes of your investigation as it was ongoing in connection with this?

A With this particular trip to New York, sir?

Q No. In connection with the event that you have described for us?

A I have some. I don't remember what they all were.

Q But in any event, you brought the entire file with you, did you?

A Yes, sir.

Q And in this file would include the original complaint form, is that correct?

A Yes, sir.

Q What else is in there?

A His FBI record.

Q His record sheet and what else, - your handwritten notes?

A No. I don't have any of those with me.

THE COURT:

Mr. Doyle, can we do this, - whatever

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you have, Mr. Belm, will you bring over when we resume and we can look at it?

THE WITNESS:

Sure.

MR. DOYLE:

I am wondering, your Honor, in light of the fact that may very well shorten or at least color the cross examination, in light of the hour, if we can take a break at this point and have him get that material.

THE COURT:

I intend to break now. Let us say we will resume, - really it will be about probably 2:15. I have another discussion with Mr. Koelbl and the other attorneys in the State Trooper hair cut case.

MRS. SREBRO:

Your Honor, could I be heard on this matter? You know we have had this problem before. Now, Mr. Belm has not testified that he had to refresh his recollection, - in fact, didn't even read through his file. Is it the order of this Court that we are required to turn over Mr. Belm's entire investigative file as thirty-five hundred material?

THE COURT:

Whatever material, - number one, I think

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it falls into various categories. This really is not thirty-five hundred. You say "complaint". By that do you mean was a complaint filed in the Ohio State Court against Mr. Gibbons and Mr. Sebastian?

THE WITNESS:

I have never seen Mr. Sebastian, your Honor.

THE COURT:

All right. It would seem to me that if there is a public record. I thought that what he meant was there was an affidavit on which a charge was placed against Mr. Gibbons in the Ohio State Court, and, of course, that is a public record. Evidently what he means is a complaint sheet that would be their investigative file.

MR. BEHRE:

Yes, and what he has with him, I understand, and correct me, Mr. Behm, is his investigative file.

THE COURT:

All right. Whatever material would be thirty-five hundred material in the ordinary case I am going to say that the Government shall produce that now. In that file there may be some statements made by other people,

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his superior, maybe the store witnesses and things which are separate from his particular statement, so if that is the case I am not directing that you make those available but whatever summary he made of his investigation, that shall be marked and made available, so why don't you do this, Mrs. Srebrow, when Mr. Behm brings the material back look at it and if in your judgment there is anything that should not be made available to defense you may set it aside, although please inform me of that action so that you and I can take it up.

MRS. SREBROW: All right. I don't want to belabor the point. You are ordering the Government to turn over that part of Mr. Behm's investigative file which is thirty-five hundred material?

THE COURT: Yes.

MRS. SREBROW: Because I would like to ask some additional time, your Honor, to consult the Department of Justice on this matter because this is a matter that has, you know, concerned our office.

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THE COURT:

We had the discussion with Mr. Elfvin and Mr. Arcara and yourself here some three weeks ago.

MRS. SREBRO:

That's correct.

THE COURT:

At that time, as I understood it, either you did check with the department or you were going to check.

MRS. SREBRO:

That is correct. We have checked with the department and I would like to have additional time to confer about this development.

THE COURT:

How much time do you need?

MRS. SREBRO:

I think if I had two hours. The reason I say that is because I am afraid people are on lunch hour from one to two and if we could come back at three we should be sure, you know, that we have everything ready to go at that time.

THE COURT:

Mr. Doyle.

MR. DOYLE:

Fine, your Honor.

THE COURT:

Three o'clock.

MR. DOYLE:

Your Honor, I may have one difficulty with Judge Gaughan and perhaps I could beg

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this Court's assistance in that matter to let him know that I am engaged.

THE COURT:

You were supposed to pick a jury this afternoon?

MR. DOYLE:

No. We were supposedly going to get into a Huntley hearing and if necessary pick a jury.

THE COURT:

Tell him that I consider this important and Mr. Behm is from Ohio, and we would certainly like to let him return today.

MR. DOYLE:

Do you want me to call. I thought perhaps, - well, all right, I will call.

THE COURT:

Why don't you call and then if there is a problem let me know.

MR. DOYLE:

Fine.

THE COURT:

You meet with Mrs. Srebro as soon as you can, Mr. Behm. Maybe you can do that right away and that will expedite whatever she has to do. We will be in recess.

(Luncheon recess taken.)

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PROCEEDINGS: December 19, 1973, after luncheon recess.
APPEARANCES: As before noted.
(Defendants present.)

G A R Y C. B E H M, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

CROSS EXAMINATION BY MR. DOYLE (resumed):

THE COURT: The defendants are here and defense counsel. Mr. Behm has returned to the stand. As we left this morning at that time after listening to testimony of Mr. Behm, the witness now on the stand, it would appear to the Court that in the kind of context of this case that in order to carry on a fruitful cross examination orderly procedure requires that any report of investigation, or as Mr. Behm describes it, his complaint sheet, should be made available in the nature of similar to materials which would be turned over in a trial of the case in the nature of thirty-five hundred material and at that time Mr. Behm

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was going to bring over to the United States Attorney what he had. What is the nature now, - what is it, Mrs. Srebro?

MRS. SREBRO:

Your Honor, when we broke at 1 o'clock I had ordered the Government to turn over that portion of Mr. Schn's investigative file which is thirty-five hundred or Jencks material. At that time you were kind enough to give me a two hour adjournment until I could consult with the Department of Justice concerning this matter. I and Mr. Elfvin have since been able to contact the Department of Justice and their policy decision as well as the policy decision of the U.S. Attorney's office is that thirty-five hundred or Jencks material is not to be turned over at a suppression hearing but rather only at the trial itself, and this position is taken to avoid what we see as prejudice both in this case and to avoid setting a precedent in other cases and our authority for this is United States vs. Conello decided by the Second Circuit in 1969, 410 F2d 536, which

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was cited to your Honor at a suppression hearing held on November 20, 1973, in the case of United States vs. Annette Nugent, Manuel Fardomo, Daniel Nugent and Stephen Levy, at which time your Honor made a prospective decision that in all future cases Jencks material would have to be turned over.

THE COURT:

That is 410, Mrs. Srebro, the citation?

MRS. SREBRO:

I am sorry, yes, it is only 3:10. Yes, it is 410 F2d. I didn't think I talked that long.

THE COURT:

I feel that way, Mrs. Srebro, quite often. I think I ought to make clear that this is not an automatic situation that there may be cases where it appears to me that there is good argument, that perhaps there is a good argument that the Government may be able to make why material should not be turned over at this time, but these things perhaps should be taken up on a case by case basis. What I mean to indicate is as a general rule this is something which the

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Government should look forward to and be ready to guard against. What is the page number?

MR. LESANO: 536.

MR. DOYLE: 536.

THE COURT: 536. I am familiar with the Covello case. I read it the last time, but so we could discuss it it seems a good idea to me to bring it out again. Beginning at page 543 in that case is where the Court discussed the Jencks Act which we are concerned with here. That is where you would start off, I believe, is it, Mrs. Srebno?

MRS. SREBRO: Yes, I would, in the middle of page 543, where it says the Act was enacted by Congress in order to qualify the loose interpretations the lower federal courts had accorded the Supreme Court decision in Jencks, and then continuing on to the next page it states in any event, the courts have consistently construed the statute literally, reading "trial" to mean "trial", and have held that under thirty-five hundred "trial" does not qualify.

* * *

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Q Did he at any time request that you stop taking a written - - -

MR. COLLESAIO: Your Honor, I am going to object to the
leading. She can ask him what he did.

THE COURT: I think it best not to lead at this
stage, Mrs. Srebro.

MRS. SREBRO: I have no further questions. At this
time I move into evidence Government Exhibits
5 and 6.

MR. COLLESAIO: Your Honor, I would like an opportunity.

THE COURT: Surely.

CROSS EXAMINATION BY MR. COLLESAIO:

Q Mr. Zona, can I see the Government exhibits? Do you have
them there? Mr. Zona, prior to your testimony this morning
did you have an opportunity to review your file regarding
Mr. Sebastian?

A Just for the purpose of recalling dates and places.

Q Okay, and what exactly did you review?

A Basically, one memorandum report covering the arrest of Mr.
Sebastian.

Q And what is the title of that report?

A Memorandum report.

MR. COLLESAIO: Memorandum report. Your Honor, at this

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time I would ask to see that report.

MRS. SREBRO: Your Honor, may I ask Mr. Zona some questions?

THE COURT: Yes.

REDIRECT EXAMINATION BY MRS. SREBRO:

Q Mr. Zona, are you testifying here today from independent recollection of these events?

A Yes.

Q And you say you reviewed one portion of your investigative file?

A Yes.

Q Which you describe as a memorandum of arrest?

A Memorandum of arrest, yes.

Q And in that you only looked at, as you said, dates and times, is that correct?

A Yes.

Q And not for any of the contents?

A No, Ma'am.

MRS. SREBRO: Your Honor, this witness is testifying from independent recollection there is no showing that he is testifying from his recollection being refreshed in any way.

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THE COURT:

Mr. Collemmo and Mrs. Brebro, my prior ruling here did not go on the ground of that old rule of evidence which pertains to civil cases and other cases than when a witness reviews a statement a record he made on a prior occasion, that if he uses that to refresh his recollection for trial that it should be made available for cross examination. The base of the Court's ruling is a different one. It seems to me in a criminal case we are more concerned with accuracy so that even if a witness does not use a prior statement or a prior summation or a prior memorandum that made in order to prepare himself for trial it still ought to be made available to defense counsel to test the direct examination of the witness because I think all of us can agree that if a witness makes a memorandum, doesn't look at it, some time passes, he testifies, you know, especially with an agent where he reviews many cases that it would seem to me that for an orderly procedure the best procedure for the

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witness to follow is for him indeed to carefully review any memoranda before he takes the witness stand so that in order to make sure, and I certainly accept Mr. Zona's statement here that he did not review the memoranda, I think it then even becomes more important for defense counsel to be able to have a look at this memoranda in order to use it during cross examination if he desires.

MRS. SREBRO:

Since your Honor is basing it upon the same ruling as was done with Mr. Behm, that this Jencks material must be turned over at a pretrial hearing I am afraid the Government will have to take the same position.

THE COURT:

You take the same position?

MRS. SREBRO:

Yes.

THE COURT:

Do you have Mr. Zona's report here?

MRS. SREBRO:

Yes, I do.

THE COURT:

Mrs. Srebro, I can only leave this to you and zone, to Mr. Zona, - that is a very fat report. In it there are probably statements of witnesses.

* * *

**Notice of Order Denying Extension of Time to File
Petition for Certiorari—September 16, 1974.**

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

September 16, 1974

Stanley J. Collesano, Esq.
76 Niagara Street
Buffalo, New York 14202

RE: Anthony James Sebastian and
Patrick Gibbons v. United
States, No. A-158

Dear Mr. Collesano:

Your application for an extension of time to file a petition for a writ of certiorari in the above-entitled cause was presented to Mr. Justice Marshall, and it was denied by him today with the following endorsement thereon:

"Application - Denied for failure
to comply with Rule 34(2).
Thurgood Marshall
9/16/74"

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

Julian S. Garza, Jr.
Julian S. Garza, Jr.
Deputy Clerk

jmh

cc: The Honorable Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

EXHIBIT B

**Pages of Transcript of Renewed Suppression
Hearing—June 18, 1975.**

THE COURT:

Without further argument, I agree, Mr. Doyle. I think it was clear that the reason you said, "We will not cross examine further", is because, "We do not have the documents which Judge Curtin said to give to us", and that was the reason for it and, therefore, now that the Circuit Court has said that you are not entitled to the documents, but they do not say that you are not entitled to cross examine so let us proceed, Mr. Williams.

MR. DOYLE:

Just a couple of preliminary matters, your Honor, respectfully. I think we have all, of course, read the opinion of the Second Circuit carefully and fully. I think that clearly the thrust of the Second Circuit decision was that certainly justice would be best served in all cases if such material was turned over. I think the Second Circuit respectfully endorsed the reasoning and the rationale of this court's order completely. I think what

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further than that and encouraged U. S. Attorneys to voluntarily comply with the requirement that this Court was placing upon them, but held merely that they were without constitutional authority to overturn the Jencks Act, so-called, and that, in fact, they were not empowered to overrule that legislation. Now, in light of the fact that there has been a change in the United States Attorney's office from the viewpoint of the United States Attorney, I think it would be of great benefit at this point, your Honor, to find out if the policy that was apparently stated under the former U. S. Attorney of not voluntarily giving up this material as I think the Court clearly recommends, whether or not that policy is still in effect now under new leadership in this office.

THE COURT:

Mr. Williams, what about that?

It seems not only practical considerations, but considerations of fairness, for example, I want to tell you right

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no that I am going to direct you to have these witnesses here at the time of trial so that if necessary, we will put them on the stand at the time of trial and make these reports available then. I think that the position of your office here, you know, as the Second Circuit said, Congress didn't get around to it, they never thought about it, really, and Congressmen aren't trial lawyers and I think if you said to the average Congressman, "What do you think here", they would say, "Why, we meant that these materials should be available as an essential part of the trial procedure", and so many of these cases hinge upon the hearing. Everything falls or goes down or stays up depending upon what happens at the hearing, so I know that you are a soldier in the ranks here, but has your office changed?

MR. WILLIAMS:

Number one, so the record is clear, I don't know, - well, I shouldn't say I don't know if our policy has

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changed. I think the U. S. Attorney would have to make a statement on that. I am certainly prepared today to make available to defense counsel for purposes of cross examination, those reports and memoranda that have been prepared and reviewed by the witnesses and I will be happy to set forth on the record - -

THE COURT:

That is what I ordered to do the last time and then you took an appeal, but I am glad that you - -

MR. WILLIAMS:

I think it changed from this point of view, your Honor, that certainly because of the lapse of time from the date of the incidence, the arrest of Gibbons, which I believe took place in December of '72 and Mr. Sebastian, it took place in, I think, May of '73, certainly, time has lapsed and it has been necessary for the witnesses to review certain reports and memorandums and to the extent that their testimony is based upon having had their memory refreshed from looking at these reports

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I am making them available.

THE COURT:

That is a very discouraging statement, because then what you are saying is, "Judge, we urge you to delay hearings so that we get to a point where witnesses will have to review their notes". The point, the reason why it is important that lawyers get to look at the witnesses' notes at any one of these hearings is to make sure that there is, - the testimony they give is not contradicted by something that they have written at the time that the event occurs and simply because the witness reviewed his notes doesn't change the theory of having defense counsel look at them at any time, but if that is the position, I welcome it.

MR. ABRAMOWITZ:

I just would like to ask the Assistant United States Attorney if it is his representation that the agent and the police officer have reviewed all of the materials which they prepared for the case.

THE COURT:

Do you know what they reviewed?

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MR. ABRAMOWITZ:

I mean, are we going to get everything or aren't we, as broadly as I can put it.

THE COURT:

Under 3500 material rules, you are only entitled to look at the memoranda that the witness made at the time of the event. Simply because a witness gets on the stand, you are not entitled to look at the entire case file.

MR. ABRAMOWITZ:

No, I am not disputing that at all, your Honor. You are absolutely correct. I think everyone is in agreement. My point is assuming this was a trial now and not a hearing, is the Government going to give us all of those materials which it would be required to give us at trial instead of a hearing or is it the Government's position that only certain select portions of the agents' memoranda have been reviewed. I just want to know what we are getting is all, because at this point, the Second Circuit has made a ruling which is binding on this Court.

MR. WILLIAMS:

I think the answer to that is what

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I am making available is everything that these agents have reviewed which is everything except the entire Selective Service, or rather, Secret Service file, which is a voluminous file which contains many matters that are not specifically related to this case, matters relating to what witnesses there are, what the witnesses expect that testimony may be. I am not making that available.

THE COURT:

Why don't you do this, Mr. Williams. Mark what you will make available and then we will permit Mr. Doyle and Mr. Abramowitz to review it and then we will be ready to proceed.

MR. WILLIAMS:

All right. From the previous exhibits, your Honor, already marked on the last hearing, I am prepared to make available what was previously marked Court Exhibit Number 1, which is a report of the Marion County Sheriff's Department, Deputy Behm, relates to Gibbons and an individual by the name of Green. What has been

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previously marked Court Exhibit Number 2 which relates to the Defendant Gibbons also prepared by the Marion County Sheriff's Department; what has been previously marked as Court Exhibit Number 3 which relates to a George Arthur Green prepared by Deputy Behm, Marion County Sheriff's Department; what has been previously marked, your Honor, as Number 4, is the entire Secret Service file and I am not prepared to turn over the entire file which has many, many matters which are unrelated to the purpose of this hearing, as I indicated - -

THE COURT:

I do not direct that, but why not take a recess and you review what you do have.

MR. WILLIAMS:

Well, I have a few more yet. If I can set these forth for the record - -

MR. DOYLE:

Excuse me. Were portions of Number 4 to be made available?

MR. WILLIAMS:

The portions of Number 4 are previously marked Court Exhibit Number 5 which is a report of Daniel Hurley who

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was formerly the special agent in charge of the Secret Service office, titled, "A case report".

MR. ABRAMOWITZ:

That will be?

MR. WILLIAMS:

That will be made available except, and will state this, frankly, on the record, Page 5 of the sheet which sets forth the names of witnesses and their expected testimony.

THE COURT:

I don't direct that you give that.

MR. WILLIAMS:

And what has been previously marked as Court Exhibit Number 6 which is a report of Special Agent Samuel J. Zona.

MR. ABRAMOWITZ:

Your Honor, I ask, - I am sorry. You are not through. Are you through?

MR. WILLIAMS:

Yes.

MR. ABRAMOWITZ:

I just ask this question because this case aroused a great deal of interest and could ultimately reach the United States Supreme Court. I pose this question to Mr. Williams, are you representing to the Court and to my co-counsel and myself that at the present time, for whatever reason is unimportant,

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but at the present time you will be giving to the defense attorneys all the material which they would be entitled to had these two witnesses, Mr. Behm and Mr. Zona, taken the stand at trial?

MR. WILLIAMS:

There would, of course, be a couple of additional things. One would be the prior suppression hearing testimony.

MR. ABRAMOWITZ:

Of course, we have got that.

MR. WILLIAMS:

And the only other category would have been the grand jury testimony of Agent Samuel Zona.

MR. DOYLE:

So that the record is clear, we are not getting everything we would at trial.

MR. ABRAMOWITZ:

We are not getting every prior statement?

THE COURT:

Mr. Williams, can't you answer the question? The question is a simple one; if we were now at trial and the demand was after they finished their direct testimony and the demand was for 3500 material, would you turn over the same material or are you holding something back?

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MR. WILLIAMS:

The only thing I am holding back - -

THE COURT:

No, that is not. The witnesses I say don't have to answer "yes" or "no", but I will put it to you, if we were at trial and your witnesses had finished their direct examination and the defense counsel had made demand at that time for 3500 material, would you turn over the same materials or are you going to hold something back?

MR. WILLIAMS:

I suppose the answer is "no". The only other thing would be the grand jury testimony and I will offer that to be marked so it will be available.

THE COURT:

You are going to turn over the grand jury testimony as well of these witnesses.

MR. WILLIAMS:

Mr. Behm did not testify before the grand jury. Mr. Zona did and I will mark that and make it available.

MR. ABRAMOWITZ:

So that the record is clear, is the position of the United States, the Government is now supplying defense attorneys with every piece of material that we will be entitled to under the

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Jencks Act if we were now at trial?

MR. WILLIAMS:

This would be everything that I would consider to be 3500 material, anything that has been reviewed by the witnesses for testimony.

MR. ABRAMOWITZ:

That is not the provision of 3500.

MR. WILLIAMS:

Any statements they made, any reports that they made.

MR. ABRAMOWITZ:

And it is your representation to us that they have reviewed every statement or report they have made and I don't care why you are giving it to us, but you are giving us everything that would be provided at trial?

THE COURT:

Let us put an end to this. The witnesses are here. Let us go ahead with a review of the materials. We have such and such a statement and I suppose we can't really resolve it now. You are not entitled to the case report, if that is what you are asking for.

MR. ABRAMOWITZ:

No, your honor.

THE COURT:

All right. You have certain materials. If you don't think you have the materials you think you ought to have

* * *

Letter from Defense Counsel—September 12, 1975.

Law Offices of

MARTOCHE, COLLESANO, ABRAMOWITZ & GELLER

76 NIAGARA STREET

BUFFALO, NEW YORK 14202

STANLEY J. COLLESANO
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LINDA L. CLEVELAND

TELEPHONE 855-0717
AREA CODE 716

September 12, 1975

RECEIVED

SEP 13 1975

JOHN T. CURTIN
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF NEW YORK

Honorable John T. Curtin
Chief Judge
United States District Court
United States Court House
Buffalo, New York 14202

Re: United States of America vs.
Anthony Sebastian
Cr. No. 73-237

Dear Judge Curtin:

At the suppression hearing held in the above case on June 18, 1975, I requested an adjournment in order to review medical records which had recently come to my attention indicating that the Defendant was a catatonic schizophrenic.

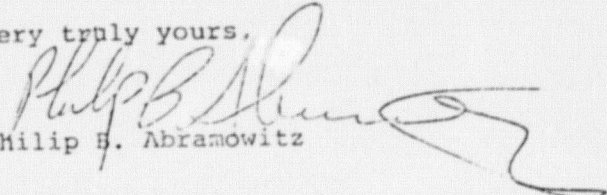
After reviewing the psychiatric records of the Defendant with Dr. Michael J. Lynch, and after having researched the legal aspects of the ability of a person with a history of mental illness to knowingly, intelligently and voluntarily waive his Miranda rights, both Dr. Lynch and I have concluded that any argument which could be made in support of suppression from synthesizing the specific psychiatric history of the Defendant with the present state of the law would be frivolous. Therefore, instead of wasting the Court's valuable time, I would request that the proceedings now scheduled for Wednesday, September 17 at 9 a.m. be cancelled. I am satisfied to have you make your ruling as to the admissibility of Mr. Sebastian's confession on the present state of the record.

Letter from Defense Counsel—September 12, 1975.

Honorable John T. Curtin
September 12, 1975
Page 2

Thank you for your attention to this matter.

Very truly yours,


Philip B. Abramowitz

PBA/sg

cc: George P. Doyle, Esq.
10 Ellicott Square Building
Buffalo, New York 14203
Dr. Michael J. Lynch
1275 Delaware Avenue
Buffalo, New York
Roger P. Williams, Esq.
Assistant United States Attorney
502 United States Court House
Buffalo, New York 14202

46

Letter from Defense Counsel—October 3, 1975.

D. quis me filo.

62-11713-237

Law Offices of

MARTOCHE, COLLESANO, ABRAMOWITZ & GELLER

76 NIAGARA STREET

BUFFALO, NEW YORK 14202

STANLEY J. COLLESANO
SALVATORE R. MARTOCHE
JACK J. GELLER
PHILIP B. ABRAMOWITZ
LINDA L. CLEVELAND

TELEPHONE 855-0717
AREA CODE 716

October 3, 1975

Hon. John T. Curtin
Chief Judge
United States District Court
United States Court House
Buffalo, New York 14202

RE: UNITED STATES OF AMERICA
VS.
ANTHONY SEBASTIAN

Dear Judge Curtin:

I do not wish to submit anything further on the above referenced case. I am happy to have the Court decide this case on the materials it has presently before it.

Very truly yours,

Philip B. Abramowitz
Philip B. Abramowitz

PBA:pmh

cc.: Mr. Roger P. Williams

RECEIVED

OCT 6 - 1975

JOHN T. CURTIN
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF NEW YORK

#15

March 11, 1976 Letter from Court Setting Trial
Date for March 29, 1976.

JOHN K. ADAMS, CLERK

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
NIAGARA SQUARE
BUFFALO, N. Y. 14202

March 11, 1976

George Doyle, Atty.
10 Ellicott Square Bldg.
Buffalo, N.Y. 14203

Philip Abramowitz, Atty.
76 Niagara St.
Buffalo, N.Y. 14202

Roger P. Williams, Esq.
Asst. U.S. Attorney
501 U.S. Court House
Buffalo, N.Y. 14202

Re: Cr-73-237 U.S. vs. Anthony James Sebastian &
Patrick Gibbons

Gentlemen:

Judge Curtin has directed that jury selection in the
above case is scheduled for March 29, 1976 at 11:30 A.M.

Very truly yours,

JOHN K. ADAMS, Clerk

By: *Robert J. White*
Deputy Clerk

47

Letter from Assistant U. S. Attorney,
Requesting Adjournment.

United States Department of Justice

ADDRESS REPLY TO
UNITED STATES ATTORNEY
ATTENTION OF
ASSISTANT AS SHOWN BELOW

Roger P. Williams

OUR REFERENCE

RPW:gmc.
CR. 73-237

UNITED STATES ATTORNEY

WESTERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
BUFFALO, NEW YORK 14202

March 12, 1976

Honorable John T. Curtin
Chief Judge
United States District Court
United States Courthouse
Buffalo, New York 14202

Re: U. S. v. Sebastian and Gibbons
Criminal 1973-237

Dear Judge:

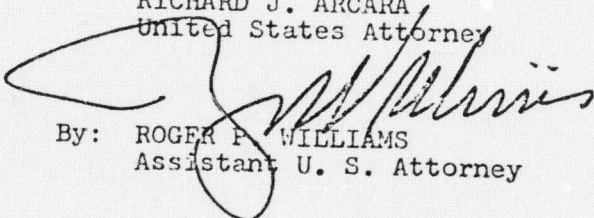
I have received your notice scheduling the above-captioned case for jury selection on March 29, 1976.

I have been invited to lecture at the Department of Justice Advocacy School in Washington, D.C. covering the period March 29 through March 31, 1976. For that reason, I would appreciate it if this case could be put back one week.

Thank you for your courtesies.

Respectfully yours,

RICHARD J. ARCARA
United States Attorney

By:  ROGER P. WILLIAMS
Assistant U. S. Attorney

ccs: George P. Doyle, Esq.
Philip Abramowitz, Esq.

RECEIVED

MAR 13 1976

CLERK - CURTIN
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

#17

D. C. Form No. 18 (Rev. Sept. 1953)

1944

2-73-237

at

... , on ... , 19 ... , at ...
... 5 76 10:00 A.M.

trial originally scheduled for April 20, 1974.

Date March 11, 1976

Clerk.

By _____
Deputy Clerk.

To
George J. Gile, Atty.
10 Hillside Square Bldg.
Buffalo, N.Y. 10603

Philip Abrahamson, Atty.
76 Niagara St.
Buffalo, N.Y. 1.202

Robert H. Williams, Jr.
Asst. U.S. Atty.
101 U.S. Court House
Tacoma, W. 1, 202

Letter from Court Setting Trial Date for April 19, 1976.

JOHN K. ADAMS, CLERK

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
NIAGARA SQUARE
BUFFALO, N. Y. 14202

April 1, 1976

George Doyle, Atty.
10 Ellicott Square Bldg.
Buffalo, N.Y. 14203

Roger P. Williams, Esq.
Asst. U.S. Atty.
501 U.S. Court House
Buffalo, N.Y. 14202

Philip Abramowitz, Atty.
556 Franklin St.
Buffalo, N.Y. 14202

Re: 87-237 U.S. vs. Anthony
Sebastian & Patrick Gibbons

Gentlemen:

A pre trial conference will be held in the above case
on April 19, 1976 at 9:00 A.M. Trial to follow.

Very truly yours,

JOHN K. ADAMS, Clerk

By: Robert J. White
Deputy Clerk

#21

Pages of Transcript of "Trial" May 7, 1976.

PROCEEDINGS: May 7, 1976, 11:05 A.M.

APPEARANCES: As before noted.

(Defendants present.)

(Jury not present.)

THE COURT: In the case of United States against
Sebastian and Gibbons, Mr. Williams.

MR. WILLIAMS: Yes. Your Honor, in this Criminal
1973-237, under this particular indictment
the defendants Anthony Sebastian and Patrick
Gibbons are charged with three counts,
Count 1 being a conspiratorial count, Count
2 and Count 3 being substantive counts.

Count 1 charges that the conspired,
combined and unlawfully agreed to violate
Section 472 of Title 18 by uttering and
passing with intent to defraud, forged
obligations of the United States, namely
36 United States Savings Bonds.

Counts 2 and 3 are substantive counts
which charge forging and uttering of two
separate savings bonds with intent to
defraud in violation of Title 18, Section
472.

The problem, your Honor, as I see it,

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS - U. S. DISTRICT COURT

Pages of Transcript of "Trial" May 7, 1976.

and after some careful research, including both Second Circuit and Ninth Circuit cases, that under the sections charged under no theory of the Government's proof could we prove that the defendants violated these sections, for, in fact, the savings bonds which are the subject matter of this indictment are in fact genuine obligations of the United States and what is forged is not the obligation but simply the endorsement of the owner or beneficiary on the reverse of the savings bond.

It does constitute a violation of Section 495 of Title 18. However, that is not what is charged in this indictment and for that reason it is apparent that the indictment is invalid to the extent that were we to go to trial and a conviction were obtained it would be an invalid conviction and subject to reversal and dismissal by the Second Circuit Court of Appeals.

THE COURT:

Or motion to defense.

MR. WILLIAMS:

Or motion, yes, motion by defense counsel at this stage of the proceedings. Under those circumstances the Government

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS

Pages of Transcript of "Trial" May 7, 1976.

will move to dismiss this indictment and reserve on its right to seek a re-indictment.

THE COURT:

Mr. Doyle, Mr. Abramowitz, either one have any comment?

MR. DOYLE:

If we may have a moment, your Honor. Your Honor, respectfully, George Doyle appearing on behalf of Patrick Gibbons, I am in complete agreement with the Government's statement of the facts here, that in fact the savings bonds were genuine obligations and that accordingly a conviction, or I should say a motion to dismiss the indictment at the conclusion of the Government's case would have to be granted. I stipulate all of those facts for the purpose of this motion and I have no objection to dismissal of this indictment.

MR. ABRAMOWITZ:

Your Honor, speaking for Mr. Sebastian I join in Mr. Doyle's comments. I, however, to try to be as clear as I can, I don't join in Mr. Williams' statement that a violation of any other section of the United States Code could be proved, that clearly it would be impossible for the Government to prove a conspiracy to violate Section

Pages of Transcript of "Trial" May 7, 1976.

472 or any of the 472 charges which are found in Counts 2 and 3 and I reserve all rights to move against any future indictment or information which might be laid, on whatever grounds may arise.

MR. DOYLE: May I also reserve the same rights and add my stipulation only runs to the proof of this indictment.

THE COURT: That is certainly understood. We do not know what the United States Attorney will do in the future and whatever he does in the future certainly you may have the right to move against.

Mr. Williams, this is an unfortunate turn of events but it is essential and therefore I have no other alternative on your motion to dismiss the charge pending against both Mr. Sebastian and Gibbons and they are now as far as any bail arrangement this ends the litigation in this particular case. That is Criminal - - -

MR. WILLIAMS: 1973-237, your Honor.

THE COURT: 1973-237. Very well, Mr. Doyle and Mr. Abramowitz.

MR. DOYLE: May this record, your Honor, also

Pages of Transcript of "Trial" May 7, 1976.

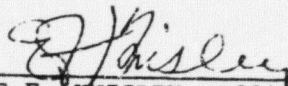
respectfully reflect that a jury was
empanelled and sworn as of Tuesday of
this week.

THE COURT: No question about that.
MR. DOYLE: Thank you. Fine.
MR. ABRAMOWITZ: Thank you, your Honor.
THE COURT: You are all excused.

(Proceedings concluded at 11:12 A.M.)

* * * * *

I certify that the foregoing is a complete
and accurate transcription of my shorthand
notes taken herein.


E.F. KNISLEY, Official Reporter,
USDC, WDNY.

Superseding Indictment—June 24, 1976.

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-
ANTHONY JAMES SEBASTIAN and
PATRICK GIBBONS.*Superseding*
MARCH 1976 SESSION ~~TERM~~
(Impaneled 3/16/76)

No. (R73-237)

Vio. T. 18, U.S.C.,
Sections 371, 495
and 2COUNT I

The Grand Jury Charges:

On or about the 26th day of May, 1972, in the Western District of New York, the defendants, ANTHONY JAMES SEBASTIAN and PATRICK GIBBONS, and Richard Ames, not named as a defendant, did aid, abet, counsel, command and induce Dolores Dombrowsky to forge the endorsement of Bernice Goulder on a United States Savings Bond bearing Serial Number Q1987602561E in the face amount of \$25.00, which bond was owned by Bernice Goulder, for the purpose of obtaining and receiving a sum of money from the United States and its agents; all in violation of Title 18, United States Code, Sections 495 and 2.

[Counts II - XXXVI, identical to Count I except that a different serial number is alleged in each Count, are omitted from this Appendix.]

Superseding Indictment—June 24, 1976.

COUNT XXXVII

The Grand Jury further charges:

That between on or about May 25, 1972 and May 26, 1972, in the Western District of New York, and elsewhere, the defendants, ANTHONY JAMES SEBASTIAN and PATRICK GIBBONS, did wilfully, knowingly and unlawfully combine, conspire and agree together and with Richard Ames and Dolores Dombrowsky, named as co-conspirators but not co-defendants, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Sections 495 and 2 by forging the endorsement of Bernice Goulder on thirty-six (36)

Series E United States Savings Bonds, set forth above, for the purpose of obtaining and receiving a sum of money from the United States and its agents; in violation of Title 18, United States Code, Section 371.

OVERT ACTS

At the following times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effectuate the objects thereof:

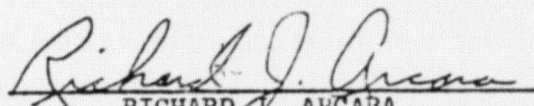
1. On or about the 25th day of May, 1972, the defendant ANTHONY JAMES SEBASTIAN gave Richard Ames thirty-six (36) Series E Savings Bonds in the name of Bernice Goulder.

2. On or about the 25th day of May, 1972, the defendant ANTHONY JAMES SEBASTIAN gave Richard Ames identification in the name of Bernice Goulder.

3. On or about the 26th day of May, 1972, the

Superseding Indictment—June 24, 1976.

met at the Casablanca Restaurant in Buffalo, New York,
for the purpose of receiving a portion of the proceeds
resulting from the cashing of said thirty-six (36)
United States Savings Bonds.


RICHARD J. ARCARA
United States Attorney

A TRUE BILL:



WJF Foreman

Notice of Readiness—July 15, 1976.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

CR NO. 1973-237

v.

ANTHONY SEBASTIAN
PATRICK GIBBONS

Defendant

The United States of America, plaintiff herein, being ready to proceed to trial in the above entitled action, hereby moves said action for trial and asks this Court to set it down for trial at the first convenient date of this Court's calendar following completion of any and all motions.

RICHARD J. ARCARA
UNITED STATES ATTORNEY

By:



ROGER P. WILLIAMS
ASSISTANT U.S. ATTORNEY

Letter from Defense Counsel—July 2, 1976.

Doyle & Denman

ATTORNEYS AND COUNSELORS AT LAW

JAMES B. DENMAN
GEORGE P. DOYLEELLICOTT SQUARE BUILDING
BUFFALO, NEW YORK 14203
TELEPHONE 858-3488
AREA CODE 713

July 2, 1976

Hon. Edmund F. Maxwell
United States Magistrate
United States Courthouse
Buffalo, New York 14202Re: U.S. vs. Sebastian and Gibbons
C.R. 73-237

Dear Magistrate Maxwell:

I am writing this letter in order to request additional time to file motions in the above referenced case. The reason for the request for additional time is that this office has been involved in the trial of a murder case in State Court for the past three weeks. Accordingly, I have not been able to devote the proper attention to preparing motions for a thirty-seven count indictment. If motions could be filed by July 12, with argument on July 20, I would have the necessary time to prepare those motions.

Very truly yours,

DOYLE & DENMAN

*Reschedule
If not already done**Robert S. Sichel*By:
ROBERT S. SICHEL

RSS/clo

cc: Roger P. Williams
Assistant United States AttorneyRobert C. Macek, Esq.
565 Franklin Street
Buffalo, New York 14202

RECEIVED

JUL 6 1976

U. S. MAGISTRATE
BUFFALO, N. Y.

Motion for Dismissal—September 20, 1976.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

- vs -

ANTHONY JAMES SEBASTIAN and
PATRICK GLENNES

Defendants

NOTICE OF MOTION

CR. 73-237 (super-seding)

PLEASE TAKE NOTICE that upon the annexed affidavit of Robert C. Macek, Esq., attorney for Anthony James Sebastian, sworn to on the 20th day of September, 1976, and upon the indictment herein and upon all prior proceedings heretofore had herein, a motion will be made at the United States Courthouse at Buffalo, New York, in Part I thereof, on the 4th day of October, 1976 at 9:00 in the forenoon of that day, or as soon thereafter as counsel may be heard, for an Order dismissing the indictment on the grounds that (1) requiring the defendants to stand trial on the superseding indictment herein would place them twice in jeopardy in violation of the Fifth Amendment, and (2) that defendants have been denied a speedy trial.

DATED: Buffalo, New York
September 20, 1976

TO: Richard J. Arcara
United States Attorney
502 United States Courthouse
Buffalo, New York 14202
ATTN: Roger P. Williams,
Asst. U.S. Attorney

ROBERT C. MACEK, ESQ.
Attorney for defendant,
Anthony James Sebastian
Office and P.O. Address:
556 Franklin Street
Buffalo, New York 14202
Telephone: (716) 833-5000

Motion for Dismissal—September 20, 1976.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

- vs -

AFFIDAVIT

ANTHONY JAMES SEBASTIAN and
PATRICK GIBBONS

CR. 73-237 (superseding)

Defendants

State of New York :
County of Erie : ss:
City of Buffalo :

ROBERT C. MACHEK, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this Court and I am assigned counsel for Anthony James Sebastian. I submit this affidavit in support of a Motion for Dismissal of the indictment herein on the grounds that requiring the defendant to stand trial on this superseding indictment would place him twice in jeopardy in violation of the double jeopardy clause of the Fifth Amendment, and on the ground defendant has been denied a speedy trial.

DOUBLE JEOPARDY

2. On June 21, 1973, an indictment was handed up to this Court charging, in two counts, that the defendants herein did "pass and utter forged" United States Savings Bonds, in violation of 18 USC §5472 and 2, and, in one count, that they conspired to violate those sections by uttering and passing 36 savings bonds. The events charged in the substantive count were alleged to have taken place on May 26, 1972, and the conspiracy was alleged to have taken place from May 4 to May 26, 1972.

3. The 1973 indictment mentioned in the preceding paragraph is sub-

Motion for Dismissal—September 20, 1976.

stantially the same as the superseding indictment now at issue, handed up to the Court on June 24, 1976, except that 36 substantive counts are contained in the superseding indictment, and that these counts allege that the defendants and another "did aid, abet, counsel, command and induce Dolores Dobrowski to forge the endorsement" on the various savings bonds, in violation of 18 USC §§ 495 and 2. (The bonds said to be "passed and uttered" in the two substantive counts of the previous indictment now appear in counts 33 and 2 of the superseding indictment.)

4. The Government has admitted, in its response of July 15, 1976 to the defendants pretrial discovery motion, that "the indictment is based upon the same set of facts and circumstances that led to the original indictment."

5. On May 4, 1976, the original indictment was reached for trial and a jury was chosen, empanelled and sworn on that day.

6. On May 7, 1976, when the Court, defendant, defense counsel, and the previously sworn jury were ready to begin the taking of testimony, the Assistant United States Attorney moved to dismiss the indictment herein, explaining that "under no theory of the government's proof could we prove that defendants violated these Sections." (Page 9 of the transcript of proceedings at trial, May 7, 1976) The defendants, although joining in a motion to dismiss the indictment, reserved "all rights to move against any future indictment." (Pages 10-11.) The Court granted the Government's motion to dismiss.

7. On June 24, 1976, the present superseding indictment was filed with the Court.

8. The defendants submit that to require them to stand trial on the superseding indictment would place them twice in jeopardy for the same offense in violation of his rights under the Fifth Amendment.

Motion for Dismissal—September 20, 1976.SPEDY TRIAL

9. The defendant Sebastian was originally arrested in this case on May 24, 1973. It is respectfully submitted that the long delay in this case has denied defendant a speedy trial as guaranteed to him by the Sixth Amendment, rules of the Second Circuit Court of Appeals and of this Court.

10. The defendant was arrested three years and four months ago, for events alleged to have taken place four years and four months ago in May of 1972.

11. While some of the time since the arrest of defendant is chargeable to the defendant, much of it is chargeable to the Government -- far more than the six months permissible under the Second Circuit rules and the rules of this Court, and more than enough to violate defendants' Sixth Amendment rights to a speedy trial.

12. For the convenience of the Court and counsel, photocopies of the docket sheets in this proceeding are annexed hereto as Exhibit "A".

13. Although the Government originally filed, on November 29, 1973, a motion purporting to announce the Government ready for trial, defendants submit that the statement by the Assistant U.S. Attorney upon moving for dismissal of the indictment on May 7, 1976, that the defendant had been indicted under the wrong statute, vitiates this original notice of readiness and precludes any serious claims that the Government was ready for trial at any time before the filing of the notice of readiness on July 15, 1976. (Even despite this later notice, all of the time from the May 7, 1976 events up to the present must be regarded as the responsibility of the Government, because without the Government's error in the original indictment, none of this delay would have occurred and defendants would have had their trial instead of this further delay.)

Motion for Dismissal—September 20, 1976.

14. A number of specific periods of delay are chargeable to the Government, as follows:

- (a) The period from arrest on May 24, 1973 to his arraignment June 28, after the indictment June 21, a total of 35 days, must be charged to the Government.
- (b) Defendant submits that the entire period from December 19, 1973, the date of the original suppression hearing in this matter, until the resumption of that hearing June 18, 1975, a period of 18 months, must be charged to the Government. On December 19, 1973, this Court suppressed the evidence at issue upon the Government's refusal to turn over certain prior written statements made by the Government witnesses at the suppression hearing concerning the subject hearing of their testimony, for use by the defense in cross examining those witnesses. Although the Court's order was ultimately reversed by the Second Circuit, which held this Court without power to order such production before "trial" pursuant to the Jencks Act, the Government ultimately turned over all of the prior written statements which were at issue, at the resumed hearing on June 18, 1975. (Transcript of Suppression Hearing, pps. 68-79) Defendants submit that the Government's agreement to turn over these materials in 1975 makes hollow the claim (on which the original refusal was based) that the turning over of this material was an unwarranted intrusion into Government's investigative files.
- (c) Even if the entire 18 months mentioned in the preceding subparagraph are not chargeable to the Government, certain segments are:
 - (1) From the suppression December 19, 1973 to the filing of the Government's Notice of Appeal January 14, 1974, a total of 26 days.
 - (2) After the Court of Appeals reversed this Court's decision on June 7, 1974, and denied defendants' Petition for Rehearing on August 15, 1975, defendants sought an extension of the time within which to file a Petition for Certiorari, which motion for extension was denied by Justice Marshall on September 16, 1975. A copy of the Notice thereof is annexed hereto as Exhibit "B", and bears the notation that a copy of that notice was mailed also to the Solicitor General. Defendant submits that from the date of the receipt of that notice by the Department of Justice, until December 9, 1974, when the Government next took steps to move this case along, some time in 1975, must be charged to the Government.

Motion for Dismissal—September 20, 1976.

- (d) Defendants submit that the period from December 4, 1975, when this Court denied Defendants' motion to suppress evidence, up until the date of trial, May 4, 1976, must all, or nearly all, be charged to the Government, in the absence of a valid notice of readiness, as argued above in Paragraph 13.
- (e) As argued above in paragraph 13, all of the time since May 7, 1976 up to the present must be charged to the Government.
- (f) Defendant submits that the delay chargeable to the Government, totally as it does more than six months, requires the dismissal of this indictment under the Second Circuit rules regarding prompt disposition of criminal cases, Rule 4 and pursuant to the local plan for implementing said rule adopted pursuant to said Second Circuit rules.

15. Defendants have been prejudiced by the delay. The Government has conceded that the memories of witnesses have dimmed, and at the continued suppression hearing herein, conceded that the delay made it necessary for the witnesses at the hearing to refresh their memories by reference to the written reports they had previously prepared. (Transcript of Suppression Hearing, p. 71-72 Compare the testimony, at the initial Suppression Hearing, that the witnesses consulted limited portions of their report before taking the stand solely to refresh their recollection as to time and date. Transcript, p. 20-21, 23, 45-46)

The Government's witnesses who testify at trial will presumably have their memories refreshed by these prior statements and notes, which undoubtedly record primarily the facts which seemed to these law enforcement officers ("engaged in the often competitive enterprise of ferreting out crime." Johnson v. U.S., 333 U.S. 10, 14.) to incriminate the defendants. But, because of the delay, the further details which might weaken the Government witnesses' story, if elicited on cross examination, are more likely to have been lost to memory forever. The same would be true of prosecution witnesses other than those who testified at the Suppression Hearing, and of witnesses who might be called by the defense.

Motion for Dismissal—September 20, 1976.

16. Nor are the reasons for the long delay enough to justify bringing the defendant to trial 4-1/2 years after the events charged and nearly 3-1/2 years from defendant Sebastian's arrest and nearly 4 years from defendant Gibbons' arrest. Much of the delay is caused by the Government's error in proceeding under what it now says was the wrong statutory provision. As argued above, much was caused by the Government's inconsistent conduct in first withholding the suppression witnesses prior statements, necessitating more than 18 months delay in completing the Suppression Hearing, and then turning over said materials, making that delay wholly unnecessary.

17. Defendant therefore respectfully submits that the long delays in this case have violated defendants' rights under the Sixth Amendment and under the cited Court rules.

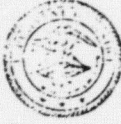
WHEREFORE, defendant requests that the indictment herein be dismissed.

ROBERT C. MACEK

Signed and Sworn To Before Me this
20th day of September, 1976.

Letter of Assistant U. S. Attorney—October 3, 1977.

United States Department of Justice



UNITED STATES ATTORNEY

WESTERN DISTRICT OF NEW YORK

UNITED STATES COURT HOUSE

BUFFALO, NEW YORK 14202

ADDRESS REPLY TO
UNITED STATES ATTORNEY
ATTENTION OF
ASSISTANT SHOWN BELOW

Roger P. Williams

October 3, 1977

OUR REFERENCE
RPW:am
CR 1973-237

Hon. John T. Curtin
Chief Judge
Western District of New York
624 United States Courthouse
Buffalo, New York 14202

Re: United States v. Sebastian and Gibbons
CR 1973-237

Dear Judge Curtin:

The Court of Appeals on September 26, 1977 affirmed your decision denying the defendants' motion to dismiss the indictment on grounds of former jeopardy. Judgment thereon has been entered and a mandate will issue forthwith.

In view thereof and considering the age of this case and the fact that a previous speedy trial motion was made, I would appreciate the matter being placed on your calendar for purposes of setting a date for trial.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney

[Handwritten Signature]
BY: ROGER P. WILLIAMS
Assistant U. S. Attorney



Judgment and Commitment Order—Sebastian.

United States of America vs.

United States District Court for

ANTHONY JAMES SEBASTIAN

WESTERN DISTRICT OF NEW YORK

DEFENDANT

SUPERSEDING INDICTMENT

DOCKET NO. CR. 73-237

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this dateMONTH DAY YEAR
December 6, 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant wished to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Robert Hacek, Esq.

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTYFINDING &
JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.Defendant has been convicted as charged of the offense(s) of aid, abet and induce a person to
forge the endorsement on U.S. Savings bond (Cts. 1 & 2), in viola-
tion of T. 18, U.S.C., Sections 495 & 2.SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged defendant guilty as charged and convicted and ordered that The defendant hereby

sentenced as follows: Defendant is remanded to custody of the
Attorney General for 18 months. Sentence imposed on Counts 1 and
2 and to run concurrently.SPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATIONCOMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge☐ U.S. Attorney

JOHN T. CURTIN, U.S. District Judge

Dated December 6, 1977

DEC 14 11 00 AM '77
U.S. DISTRICT COURT
W.D. OF N.Y.

Judgment and Commitment Order—Gibbons.

United States of America vs

United States District Court for

PATRICK GIBBONS

WESTERN DISTRICT OF NEW YORK

DEFENDANT

SUPERSEDING INDICTMENT

Doc. Ref. ID: A1 CR. 73-237

THE UNIVERSITY OF CHICAGO

In the presence of the attorney for the government
the defendant appeared in person on this date: —

MONTH DAY YEAR
December 6, 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of a right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

George Doyle, Esq.

(Name of course)

PLEA

☒ **GUILTY**, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE.

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged.

☐ GUILTY.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of aid, abet and induce a person to forge the endorsement on U.S. Savings bond, (Cts. 1 and 2), in violation of T. 18, U.S.C., Sections 493 & 2.

SENTENCE
OR
PROBATION
ORDER

[illegible]

sentenced as follows: Defendant is remanded to the custody of the Attorney General for two and one half (2-1/2) years. Sentence is imposed on Counts 1 and 2 and are to run concurrently.

SPECIAL
CONDITIONS
OF
PROBATION

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the above, defendant's probation is suspended and it is hereby ordered that the general conditions of probation set out on the reverse be applied to the defendant. The Court may also, at the discretion of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for any of the reasons during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

X

1. *Chlorophyll a*

JOHN T. CURTIN, U.S. District Judge

12th December 6, 1977

Notice of Appeal—Sebastian.
UNITED STATES DISTRICT COURT

UNITED STATES

Docket Number CR 73-237

ANTHONY J. SEBASTIAN, et al

JOHN T. MARTIN
DEC 6 10 44 AM '77
(District Court Judge), DISTRICT COURT
W.D. OF N.Y.

NOTICE OF APPEAL

Notice is hereby given that ANTHONY J. SEBASTIAN appeals to
the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other
(specify) _____ entered in this action on DEC. 6, 1977
(Date)

Date DEC. 6, 1977
To:

Address

Robert C. Marsh
(Counsel for Appellant)

ROBERT C. MARSH
2600 MAIN PLACE
BUFFALO, N.Y. 14202

Phone Number

(716) 854-4300

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

▶ QUESTIONNAIRE

- ☒ I am ordering a transcript
☐ I am not ordering a transcript
Reason:
☐ Daily copy is available
☐ U.S. Attorney has placed order
☐ Other. Attach explanation

▶ TRANSCRIPT ORDER

- Prepare transcript of
☐ Pre-trial proceedings
☐ Trial
☒ Sentence
☐ Post-trial proceedings
☒ Pre proceedings

▶ DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE).

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of
the transcript. (FRAP 10(b)) ▶ Method of payment ☐ Funds ☒ CJA Form 21

ATTORNEY'S signature

Robert C. Marsh

DATE

DEC 6, 1977

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number
of pages.

Date _____

Signature _____

(Court Reporter)

ORIGINAL

41

Notice of Appeal—Gibbons.

UNITED STATES DISTRICT COURT

U.S. DEC 6 10 44 AM '77

V. U.S. DISTRICT COURT
W.D. OF N.Y.

Docket Number 73-237

JOHN T. CURTIN
(District Court Judge)ANTHONY SEBASTIAN
PATRICK GIBBONS

NOTICE OF APPEAL

Notice is hereby given that PATRICK GIBBONS appeals to
the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other
(specify) _____ entered in this action on 12/6/77
(Date)

Date 12/6/77
To:

Address

GEORGE P. DOYLE
(Counsel for Appellant)10 ELLICOTT SQ.
BUFFALO, N.Y.Phone Number 856-3486

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION — FORM B

▶ QUESTIONNAIRE

- ☐ I am ordering a transcript
☐ I am not ordering a transcript
Reason:
☐ Daily copy is available
☐ U.S. Attorney has placed order
☐ Other. Attach explanation

▶ TRANSCRIPT ORDER

- Prepare transcript of
☐ Pre-trial proceedings
☐ Trial
☐ Sentence
☐ Post-trial proceedings

▶ DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE)

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of
the transcript. (FRAP 10(b)) ▶ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature

George P. Doyle

DATE

12/6/77

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number
of pages.

Date _____

Signature _____

(Court Reporter)

ORIGINAL

#47

Opinion and Order of the District Court—March 14, 1977.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-vs-

CR-1973-237

ANTHONY JAMES SEBASTIAN a/k/a
TONY SEBASTIAN and PATRICK GIBBONS,

[Superseding]

Defendants

APPEARANCES: RICHARD J. ARCARA, ESQ.
United States Attorney
(ROGER P. WILLIAMS, ESQ., of Counsel)
Buffalo, New York, for the Government.

ROBERT C. MACIEK, ESQ.
Buffalo, New York, for Defendant Sebastian.

DOYLE & DEEMAN
(GEORGE P. DOYLE, ESQ. and ROBERT S. SICHEL,
ESQ., of Counsel), Buffalo, New York, for
Defendant Gibbons.

The defendants in this case were indicted in June of 1973 in a three-count indictment charging them with two substantive counts of uttering and publishing forged United States Savings Bonds and one count of conspiring to utter and publish forged United States Savings Bonds in violation of 18 U.S.C. §§472^{1/} and 371. After substantial delays caused by pretrial motions and appeals,

Opinion and Order of the District Court—March 14, 1977.

the case came on for trial in May of 1976. After the jury was impaneled and sworn, the Government, realizing that it had proceeded under the wrong statute and that the proof it was about to present did not conform to the charges alleged, requested the court to dismiss the indictment. What the Government intended to prove was that the defendants had passed genuine United States Savings Bonds with forged payee signatures.

The court dismissed the indictment on the Government's request. The defendants were then reindicted in June of 1976 and charged with violations of 18 U.S.C. §5495^{2/} and 371. Under this new thirty-seven count indictment, the Government alleges that each defendant "did aid, abet, counsel, command and induce [a third individual] to forge the endorsement of Bernice Goulder on [thirty-six separate] United States Saving[s] Bonds." The final count in the 1976 indictment is a conspiracy count which alleges the same overt acts alleged in the conspiracy count of the first indictment.

The defendants have moved to dismiss the 1976 indictment on double jeopardy and speedy trial grounds.

Opinion and Order of the District Court—March 14, 1977.

I. DOUBLE JEOPARDY

The double jeopardy clause of the fifth amendment states that ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb" The inclusion of the double jeopardy clause in the Bill of Rights was an acknowledgement by the founding fathers of this country of the severe and onerous burdens put on an individual by a criminal prosecution. The difficulties imposed on a criminal defendant were thought to be so great that it was only fair to allow the Government one chance to convict a person on any one crime. As the Supreme Court has expressed it,

the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
Green v. United States, 355 U.S. 184, 187-88 (1957).

The first inquiry for the court is whether jeopardy has attached. In the usual jury trial, jeopardy attaches upon the impaneling and swearing of the jury.

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Serfass v. United States, 420 U.S. 377, 388 (1975);
Howarth v. United States, 372 U.S. 734 (1963). Having
satisfied that requirement, in order for double jeopardy
to apply, the general rule is that the two offenses "must
be the same in law and in fact." United States v. Pacelli,
470 F.2d 67, 72 (2d Cir. 1972), cert. denied, 410 U.S. 933
(1973).

It is agreed by both the parties, and is evident
from the two indictments, that the underlying facts of the
charges alleged in each of the indictments are the same.
The Government claims, however, that the offense charged
in the 1973 indictment and the offense charged in the 1976
indictment are not identical and thus do not give rise to
the double jeopardy plea.

A comparison of the two statutes, which are re-
produced in the margin, supra, appears to substantiate this
analysis. Section 472 pertains specifically only to
"falsely made, forged, counterfeited, or altered obliga-
tion or other security of the United States," while §495,
on the other hand, under distinct and separate paragraphs,
prohibits the counterfeiting, uttering or presenting of

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"any deed, power of attorney, order, certificate, receipt, contract, or other writing" with intent to receive money from the United States Government. As the Government points out in its brief, forging a signature on a genuine United States Bond is a violation of §495, whereas the passing of a counterfeit United States Bond or other security is a violation of §472. See Roberts v. United States, 331 F.2d 502 (9th Cir. 1964).

The defendants argue, however, that the "same in law and fact" test should not be determinative in this case, because, unlike the cases on which the Government relies, the evidence here is not sufficient to support a case under both §472 and §495. For example, United States v. Pacelli, supra, cited by the Government, involved a prosecution for drug possession and distribution. The defendant was convicted of conspiracy to possess and distribute, the same offense to which he had earlier pled guilty. However, when the defendant raised the plea as a bar to the conviction, the court expressly pointed out that the alleged conspiracies involved two distinct time periods and different overt acts. The only common

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conspirator was this particular defendant. Other cases cited by the Government are similar in showing evidence of more than one offense. See United States v. McCall, 480 F.2d 359 (2d Cir. 1973), cert. denied, 410 U.S. 340 (1974); United States v. Nathan, 476 F.2d 456 (2d Cir. 1973), cert. denied, 414 U.S. 823 (1973).

The defendants urge the court to apply the "same transaction" test championed by Justice Brennan in Abbate v. United States, 359 U.S. 187 (1959), in which he stated:

. . . I think it clear that successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought under federal statutes requiring different evidence and protecting different federal interests.

* * * * *

. . . I think not mere violence to, but virtual extinction of, the [double jeopardy] guarantee results if the Federal Government may try people over and over again for the same criminal conduct just because each trial is based on a different federal statute protecting a separate federal interest. 359 U.S., at 197, 201.

It should be noted, however, that these comments are Justice Brennan's alone and have not been joined in by a

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majority of the Court. See Ash v. Swenson, 397 U.S. 436, 443 (1970) (J. Brennan, concurring). See also United States v. Cioffi, 437 F.2d 492, 497, n.5 (2d Cir. 1973). Although Justice Brennan's reading of the double jeopardy clause is persuasive, it has not yet been accepted as the law.

Defendants contend, however, that United States v. Sabella, 272 F.2d 206 (2d Cir. 1959), did accept the "same transaction" test for this circuit. That case was later narrowly interpreted by the Second Circuit in United States v. Cioffi, *supra*, 437 F.2d at 497-98, and, in light of subsequent Supreme Court decisions, the defendants' interpretation of it appears strained.

Illinois v. Somerville, 410 U.S. 453 (1973), a case that none of the parties have cited, supports our conclusion that double jeopardy does not apply in this case. In Somerville, a nearly identical situation to that before this court had occurred. The defendant was indicted and brought to trial for theft. After the jury was impaneled, the state prosecutor realized that the indictment failed to allege that the defendant intended to deprive the owner of the stolen goods. This omission of

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a necessary element of the crime charged made the indictment fatally defective. The State moved for a mistrial and the trial court granted the motion.

As the Court explained in Somerville,

. . . in cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.

United States v. Somerville, supra, 410 U.S., at 467.

Since the defect in the indictment was jurisdictional, and would be grounds for reversal under Illinois law, the Court held that the declaration of a mistrial and retrial under a new indictment were proper under the "manifest necessity" and "ends of public justice" test of United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

In the present case, the Government acknowledged that its original indictment was invalid and requested that it be dismissed. Defense counsel acknowledged that had the trial proceeded, a motion to dismiss at the conclusion of the Government's case would have to be granted. (Transcript, May 7, 1976, at 10). In granting the Government's motion to dismiss

Opinion and Order of the District Court—March 14, 1977.

the indictment, this court stated: ". . . this is an unfortunate turn of events but it is essential and therefore I have no other alternative." (Transcript, May 7, 1976, at 11).

The Somerville Court distinguished three prior Supreme Court double jeopardy decisions, United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963); and United States v. Ball, 163 U.S. 662 (1896).

In Ball, the defendant was acquitted by a jury of a charge of murder. Two codefendants, who were convicted, appealed and their convictions were reversed because the indictment was defective. The State reindicted all three of the defendants. As to the defendant who had been acquitted, the Supreme Court ruled that an acquittal, even under a defective indictment, is a bar to retrial. In the present case, unlike Ball, the trial did not proceed to verdict.

In Downum, after the jury was impaneled and sworn, the Government asked that the jury be discharged because a key prosecution witness on two of the seven

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counts was not present. The defendant urged that the two counts for which this witness was needed be dismissed and the trial continue as to the remaining charges. The trial court dismissed the jury. The Supreme Court, noting that the Government had moved to trial knowing that its witness was missing, and that the defendant had been deprived of "the valued right . . . to have his trial completed by the particular tribunal summoned to sit in judgment on him," 372 U.S., at 736, ruled that retrial was barred by the double jeopardy clause.

The Jorn case involved an unusual situation where a trial judge, after the trial had commenced and without consultation with either Government or defense counsel, dismissed the jury because he believed that the prosecution witnesses needed legal counsel before testifying. The Supreme Court ruled that this action by the trial judge was an abuse of discretion and that double jeopardy barred a retrial.

Like the situation in Somerville, this case is distinguishable from Hall, Downum, and Jorn. If this case

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had gone to a verdict, a retrial because of a defective indictment would have been barred by United States v. Bell, supra. Having considered all the circumstances, this court believed it proper to dismiss the original indictment. Consequently, Illinois v. Somerville, supra, controls and double jeopardy does not bar the prosecution under the reindictment.

II. SPEEDY TRIAL

Defendants' second contention is that they have been denied their right to a speedy trial under the sixth amendment, and under the rules of the Second Circuit and this district. There is no question but that these cases have been long delayed, but whether or not defendants' speedy trial right has been infringed requires some analysis.

The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, and the Western District Plan For Achieving Prompt Disposition of Criminal Cases,^{3/} which contain substantially identical provisions, provide that the Government "must be ready for trial within six

Opinion and Order of the District Court—March 14, 1977.

months from the date of arrest" (Rule 4). However, there are several categories of excludable time that may toll the six-month period. (Rule 5).

The defendants' most vigorous argument is that the Government's original notice of readiness for trial, filed on November 29, 1973, was a nullity because, when the trial eventually took place in May of 1976, the Government was forced to request a mistrial and a dismissal of the indictment due to its inadvertent mistake in proceeding in the indictment under the wrong statute. According to the defendants, the Government was, therefore, never actually "ready for trial."^{4/}

The Government argues that since the indictment lays new charges, the time for the Government to be prepared should begin with the new indictment. The defendants, to counter this position, mount the same argument they raised on the double jeopardy claim, namely, that this is the same prosecution as under the first indictment and since the Government's notice was faulty, this indictment should be dismissed. Neither position is totally correct.

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The Second Circuit and Western District Rules do not deal specifically with reindictments. The parties have not cited the court to any applicable case law, and, after a thorough search, the court has been unable to discover any similar cases.

Although the Second Circuit and this District's Rules do not specifically deal with reindictments, the Speedy Trial Act of 1974, 18 U.S.C. §3161(d), provides:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

* * * * *

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge. (Emphasis added).

This provision implies that a reindictment for the same offense is permissible. It also indicates that the time

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limitation commences running with the first indictment or arrest, but the Government is merely given the benefit of tolling the period of time during which no indictment is outstanding. See United States v. Flores, 501 F.2d 1356, 1360 n. 4 (2d Cir. 1974). This rule contrasts with the situation where the indictment is dismissed at the defendant's request, in which case the time limitations commence anew with the reindictment.^{5/}

The time limit of 18 U.S.C. §3161(b), which describes the time within which an indictment must be filed, does not apply to a defendant who was indicted prior to July 1, 1976. The time limits imposed by §3161(c), the subsection dealing with the time within which the Government must arraign and try a defendant, begin to run on July 1, 1976 as to all indictments filed prior to that date. Under the Speedy Trial Act, then, the Government is on solid ground in this case.

And, although the Second Circuit and Western District Rules do not specifically deal with reindictments, we believe that reindictments should be handled under those rules in a manner similar to that prescribed

Opinion and Order of the District Court—March 14, 1977.

by the Speedy Trial Act. If we analogize the Speedy Trial Act, the Second Circuit Rules and the Western District Rules, then, the Government would have to be ready for trial within six months of arrest, not counting excludable time, even in the case of a reindictment following a Government requested dismissal.

Examination of the docket sheets, the motion papers of the defendants, and the Government's memorandum in opposition, shows the following.

With respect to defendant Sebastian, the Government must be charged with the initial thirty-five days from his arrest on May 24, 1973 to his arraignment on June 28, 1973. With respect to defendant Gibbons, the moving papers do not state the date of his arrest, but it appears that he was apprehended in December of 1972. The exact date is unimportant, for the period of time between Gibbons' arrest and Sebastian's arrest is excludable under Rule 5(e) of the Second Circuit and Western District Rules. Therefore, as to Gibbons, the Government is also charged with the thirty-five days from May 24, 1973 to June 28, 1973, the date of his arraignment.

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At the time of the arraignment, the court allowed the defendants until July 26 to file motions. The motions filed on July 26 were set down for a hearing, before which briefs were to be filed, on December 19, 1973. At that hearing, the Government refused to turn over certain written statements of its witnesses and the court, citing the Government's refusal, suppressed certain evidence on December 21, 1973. The court ordered the Government to appeal, if it wished, within thirty days and the Government did so, on January 14, 1974.

The appeal by the Government was successful and the Second Circuit reversed this court's decision on June 7, 1974. United States v. Sebastian, 497 F.2d 1267 (2d Cir. 1974). The defendants' request for a rehearing was denied on August 15, 1974, and its request for an extension of time within which to petition for certiorari was denied on September 16, 1974.

The Government put this case back on this court's calendar on October 21, 1974, some thirty-five days later. At the October 21 calendar call, the defendants did not make an appearance, and the court adjourned the matter

Opinion and Order of the District Court—March 14, 1977.

until December 9, 1974. At that time, the Government announced its readiness for trial and the court directed the clerk to have the file returned from the circuit court. No appearance was made by the defendants on December 9, and the court set a new status report for January 13, 1975. The defendants again failed to appear. The Government noted that the suppression hearing was still to be completed and the court stated that it would set a new date.

On March 31, 1975, the court set a resumption of the hearing for April 22, 1975. The defendants requested an adjournment on that date and the court set June 13, 1975 as the new date. On June 13, a new counsel was substituted for defendant Sebastian and the hearing was held. Not until September 16, 1975 did Sebastian's new counsel notify the court that no further evidence would be submitted on behalf of his client. The court requested the parties to file proposed findings of fact and memoranda of law by October 28, 1975, and the case was considered submitted as of that date. On December 4, 1975, the court rendered a decision.

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On December 15, 1975, the case again appeared on the court's calendar to set a trial date, but neither defendant appeared. The court placed the case on the trial calendar and it was called for trial on May 4, 1976.

On May 7, 1976, the Government moved to dismiss the indictment. The new indictment was filed June 24, 1976 and the Government filed a notice of readiness on July 15, 1976, some twenty-two days later.

The defendants argue that the entire period from the date of the court's first suppression ruling on December 21, 1973 until the resumption of the hearing on January 13, 1975 must be charged to the Government. Pointing to the Government's decision to hand over the contested documents to the defendants at the resumption of the suppression hearing, the defendants argue that the Government's appeal was needless and a waste of the defendants' time. If there were any evidence that the Government appealed in bad faith, the defendants would be correct and the Government would be charged for this time. But merely because the prosecutor later changed his mind does not cause this court to charge the Government with bad faith.

Opinion and Order of the District Court—March 14, 1977.

As has been noted,

[t]he right of the Government to appeal decisions in the defendant's favor before jeopardy attaches is designed to protect the interest of society in lawfully prosecuting criminal offenders,

...
United States v. Bishton, 463 F.2d 887,
 300 (D.C.Cir. 1972).

In addition, Rule 5(a) specifically provides that delay caused by interlocutory appeals is excludable.

Charging the Government with the time it took to appeal, December 21, 1973 to January 14, 1974, some twenty-four days, and the time after the appeal until the Government brought the action back on the calendar, from September 16, 1974 to October 21, 1974, a period of some thirty-five days, brings the total time charged to the Government to ninety-four days.

From October 21, 1974 until January 18, 1975, the delays cannot be charged to the Government and, in fact, substantial delays during this period were due to the defendants. After the court made its suppression ruling on December 4, 1975, the case was on the trial calendar and no delay can be attributable to the Government.

Carline
p. 560

Following the dismissal of the indictment, the Government reindicted the defendants June 24, 1976. A

Opinion and Order of the District Court—March 14, 1977.

notice of readiness was filed July 15, 1976. This period of time, amounting to twenty-two days, added to the delay charged to the Government under the first indictment, amounts to a cumulative delay of one hundred sixteen days. Since this is well under the six month limit, the Government has complied with the Rules.

Compliance with the Speedy Trial Act or the Second Circuit and Western District Rules does not necessarily insulate the Government from attack under the sixth amendment speedy trial guarantee. See 18 U.S.C. §3173.

The Supreme Court, in Barker v. Wingo, 407 U.S. 514, 530 (1972), established a four-part test for sixth amendment speedy trial assertions. The four factors, which must be considered in toto, are the length of the delay, the reasons for the delay, whether or not the defendants claimed their sixth amendment right, and whether or not defendants have suffered any prejudice.

Sebastian was arrested in May of 1973 and Gibbons apparently December 8, 1972. The three-year delay in bringing defendants to trial in May of 1976 is sufficient to cause the court to closely examine the

Opinion and Order of the District Court—March 14, 1977.

reasons for the delay. See United States v. Palmer, 537 F.2d 1237, 1238 (5th Cir. 1976). A great bulk of the delay occurred, as explained supra, because of the Government's appeal of this court's suppression ruling. The defendants have not shown that this appeal was manipulative or in any way carried out in bad faith.

Prior to the present motion, there is no indication in the record that the defendants requested a speed-up in their trial. The defendants' only claim of prejudice is that the delay has dimmed witnesses' memories. Finally, the defendants argue that the primary cause of delay was the Government's mistake in proceeding under a defective indictment.

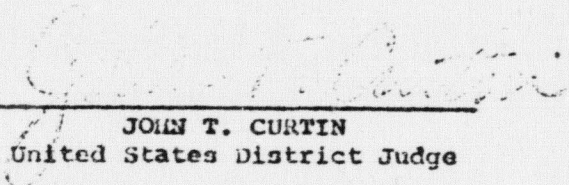
On balance, this court does not believe the defendants' sixth amendment rights have been violated. Contrary to the defendants' assertion, the court does not believe that much of the delay was caused by the Government's error that required the dismissal of the first indictment. The reindictment was accomplished within twenty-two days of the court's dismissal of the first indictment. The great bulk of the delay was due to the

Aug 7-
June 24
??

Opinion and Order of the District Court—March 14, 1977.

Government's suppression ruling appeal and defendants' numerous requests for adjournment. After considering all the factors, this court does not believe that the defendants' sixth amendment rights have been violated.

So ordered.


JOHN T. CURTIN
United States District Judge

DATED: March 14, 1977

Opinion and Order of the District Court—March 14, 1977.

FOOTNOTES1/

§ 472. Uttering counterfeit obligations or securities

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.

2/

§ 495. Contracts, deeds, and powers of attorney

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of,

Opinion and Order of the District Court—March 14, 1977.

or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited--

Shall be fined not more than \$1,000 or imprisoned not more than ten years, or both.

3/

As stated, the Western District Rules are substantially similar to the Second Circuit Rules. The Western District Rules were modified slightly when the Western District Interim Plan Pursuant to the Provisions of the Speedy Trial Act of 1974 became effective September 29, 1975.

4/

This is not a case where the Government knew it was not prepared for trial and merely filed its notice of readiness to technically comply with the statute. See United States v. Blauner, 337 F.Supp. 1383, 1388-1389 (S.D.N.Y. 1971).

5/

See §3161(d), which states:

(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee)
City of Batavia)

USA vs. Anthony James Sebastin et al
77-1504

ss. :

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 27th day of February, 19 78 I mailed copies of a printed Appendix in the above case, in a sealed, postpaid wrapper to:

10 Copies Air Mail to:

A. Daniel Fusaro, Clerk, U. S. Court of
Appeals-2nd Circuit
New Federal Court House
Foley Square
New York, N.Y. 10007

2 Copies to Doyle, Denman & D'Amico Esqs.
10 Ellicott Square Bldg.
Buffalo, N.Y. 14203
Att: George P. Doyle Esq.

2 Copies to Richard J. Arcara Esq.
U. S. Attorney
502 U. S. Court House
Buffalo, N.Y. 14202
Att: Roger P. Williams Esq.
Asst. U. S. Attorney

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Gross, Shuman, Laub & David Esqs., 2600 Main Place Tower

Buffalo, N.Y. 14202 Att: Robert C. Macek Esq.

Leslie R. Johnson

Sworn to before me this

27th day of February, 19 78

Patricia A. Lacey

PATRICIA A. LACEY

NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979